



Ohio Consumers' Counsel

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William F. Caton, Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CC Docket No. 97-137

Dear Mr. Caton:

Enclosed please find the original and eleven (11) copies of the Ohio Consumers' Counsel Reply Comments, as well as a diskette containing this pleading.

Please date-stamp and return the additional copy in the pre-addressed, postage prepaid envelope to acknowledge receipt.

Thank you for your attention to this matter.

Sincerely,

David C. Bergmann
Assistant Consumers' Counsel

DCB/pjm

Enclosures

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

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In the Matter of the Application by)
Ameritech Michigan Pursuant to)
Section 271 of the) *CC Docket No. 97-137*
Telecommunications Act of 1996 to)
provide In-Region, InterLATA)
Services in Michigan)

**REPLY COMMENTS
OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

Robert S. Tongren, in his capacity as the Ohio Consumers' Counsel (OCC), submits these reply comments to the Federal Communications Commission (Commission) in response to Public Notice DA 97-4. The OCC filed initial comments on June 10, 1997, and hereby responds to the comments filed by certain other parties.¹ On behalf of the residential telecommunications consumers of the State of Ohio pursuant to Ohio Revised Code Chapter 4911, the OCC repeats that the residential consumers of Ohio have an

¹ AT&T Corp. (AT&T), Brooks Fiber Communications of Michigan (Brooks), the Competition Policy Institute (CPI), MCI Telecommunications Corporation (MCI), Michigan Attorney General Frank J. Kelley (AG), the Michigan Consumer Federation (MCF), , and Time Warner Communications Holdings, inc. (Time Warner) filed comments. The Michigan Public Service Commission (MPSC) filed its "consultation" pursuant to Sec. 271(d)(2)(B) of the Telecommunications of 1996 (the Act). The Association for Local Telecommunications Services (ALTS) has filed another Motion to Dismiss. (It was ALTS' Motion to Dismiss Ameritech Michigan's first Sec. 271 application that triggered Ameritech's withdrawal of the application.)

interest in whether the proper conditions for local competition have been established in their sister Ameritech state of Michigan. The standards set in this application by a regional Bell operating Company (RBOC) to provide in-region interLATA service pursuant to Sec. 271(d)(1) of the Telecommunications Act of 1996 will certainly affect the eventual application of Ameritech Ohio.

At the outset, it must be noted that *none*, not one, of these commenters supports the granting of Ameritech Michigan's application at this time. The MPSC optimistically expects in its press release that Ameritech will be able to meet the checklist requirements prior to the end of the Commission's Sec. 272(d) investigation.² The curious thing is that the MPSC thought -- back in January 1997 -- that Ameritech's *first* application met the statutory tests.

Significantly, joining this chorus is the United States Department of Justice (DoJ). In its Sec. 272(d)(2)(A) consultation, the DoJ found that Ameritech Michigan's application was deficient under the Sec. 271(c)(2)(A) checklist and the Sec. 272(d)(3)(C) public interest test.³

Clearly, even under the most charitable reading, this application is part of a pattern of RBOC premature application, that has cost the RBOCs, this Commission, state

² However, as stated by ALTS (at 2), "such compliance will obviously require further review by the state, as well as a new Section 271 application to the Commission."

³ The DoJ briefly discusses the Sec 272 issues. DoJ at 27-29. Notably, the DoJ does not explicitly find that Ameritech complies with Sec. 272, stating that the "lack of information raises questions about whether Ameritech has sufficiently documented the affiliated transactions..." *Id.* at 28.

commissions, the DoJ, and other interested parties thousands of hours of effort.⁴ It is crucial that this Commission give Ameritech Michigan the same firm message given to SBC: Stay out until you are truly in compliance.⁵

In initial comments, the OCC concentrated on the Sec. 271(c)(1)(A) requirement that both residential and business customers are being served by one or more facilities-based competitors. The public interest test was also addressed. These reply comments deal with those two key aspects of the Act.

II. SEC. 271(c)(1)(A)

A. *Interpretations of the statute*

AT&T points out that the notion that the "own facilities" required by the Act to be serving competitors' customers could be unbundled network elements (UNEs) leased from the incumbent RBOC is contrary to the structure of the first sentence of Sec. 271(c)(1)(A). AT&T at 35. The Act requires RBOCs to be providing "access and interconnection" for other carriers' network facilities. The access must be for the others' facilities; the interconnection must be with the other carriers' facilities. UNEs -- part of the RBOCs' network -- do not qualify. *See also* ALTS at 23-25.

⁴ And consumed a virtual forest of trees!

⁵ See *In the Matter of the Application by SBC Communication Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order (June 25, 1997) ("the SBC Order"). In the SBC Order, the Commission found, as a threshold matter, that SBC did not meet the requirements of Sec. 271(c)(1)(a) with regard to facilities-based service to residential customers, and did not address any of the other three Sec. 271 tests.

The OCC noted that allowing "own facilities" to be UNEs would allow the competitor to exist *only* through UNEs. MCI echoes this concern (MCI at 6-7).

The OCC pointed out the fundamental flaw in Ameritech's use of the Commission's recent holding in the Universal Service docket regarding the meaning of "own facilities" in the Sec. 214(e) context. AT&T (at 16-22) provides an expansive discourse on the differences in the purposes of the two sections. *See also* Brooks Fiber at 8; MCI at 8, n. 13.

AT&T looks to the words of the statute and focuses on the requirement that service be over the "network facilities of one or more unaffiliated *competing* providers." AT&T argues that "[f]or the word 'competing' to have independent meaning ... , Ameritech must establish the presence of a truly 'competing' provider -- one that is sufficiently evolved to put pressure on the incumbent and to demonstrate that the competitive checklist is actually working." AT&T at 33. The OCC agrees with this interpretation, and also agrees with AT&T's assessment that Ameritech Michigan faces no real competition from facilities-based competitors because "these firms do not, either individually or collectively, offer a choice to more than a small fraction of Michigan customers." *Id.* at 34.⁶

⁶ CPI also sees the statute's requirement for real competition in the Sec. 271(d)(3)(C) public interest choice. The OCC agrees with CPI that the public interest requires residential consumers to have a realistic choice of providers before in-region, interLATA authority should be granted. CPI at 5.

B. The situation in Michigan

The OCC argued that Ameritech Michigan had failed specifically to show that residential customers were being served over Brooks' own facilities. Brooks, the party with the most direct knowledge of the competitive situation in Michigan, flat-out contradicts Ameritech for both customer classes: "[N]o carrier provides service predominantly over its own facilities." Brooks Fiber at 6. Specifically, "Brooks Fiber relies on Ameritech to provide it with facilities for sixty-one percent (61%) of its business customers and ninety percent (90%) of its residential customers." *Id.* at 7. Time Warner agrees: "Although the application enumerates Brooks Fibers' facilities, it does not demonstrate definitively that these facilities are actually used, in whole or in part, to provide service to residential customers." Time Warner at 14.⁷

The DoJ does not address the question of whether UNEs are "own facilities" for purposes of Track A. DoJ at 7, n.11. Without addressing that question, however, DoJ states that "it is reasonable to conclude that Brooks is predominantly a facilities-based provider in Michigan...." DoJ at 7. The DoJ cites to Ameritech's Brief (at 10), the MPSC Consultation (at 10), and Brooks' Opposition (at 7, 9). Yet the statements in neither the Ameritech Brief nor the MPSC Consultation square with Brooks Fiber's claim (cited

⁷ Time Warner voices its disagreement with the DoJ's Addendum to the SBC Evaluation, where the DoJ allowed that service to residential customers only by resale -- much less through UNEs -- would comply with the Act. Time Warner at 14, n.23. The OCC agrees; whatever standards apply to business customers in this context must also apply to residential customers. The Act gives no support for the DoJ's position.

above) that only 10% of its residential customers are served by Brooks' own facilities.

Clearly, the DoJ has failed to articulate a reasonable basis for its conclusion.⁸

III. THE PUBLIC INTEREST TEST

The OCC agrees with CPI that the public interest demands that customers have a realistic choice of local providers before interLATA authority is granted. The definition of "realistic choice" set out by CPI makes sense:

[T]he realistic choice approach does not require that consumers actually subscribe to a competitive provider of local telephone service. It only requires that consumers be able to choose an alternative provider of local service. On the other hand, consumers do not have a realistic choice unless competitors are actually taking orders and providing service in the market. In other words, it is not enough if a competitor is authorized to provide service and has built facilities or ordered access and interconnection. Competitors must be operational, and consumers must be able to subscribe to competitors at the time the RBOC application is filed.

CPI at 9. Further, that "realistic choice" must be available more ubiquitously than in one of an RBOC's markets in a particular state.⁹

The Michigan Attorney General emphasizes, in a slightly different context, one of the dangers of allowing Ameritech into the interLATA market before the local market is

⁸ If the DoJ's conclusion here is driven by the position taken in SBC that service to residential customers need not be facilities-based, that is a further reason to reject the DoJ's finding, as explained in the previous note.

⁹ While a realistic choice available to all Ameritech Michigan customers would clearly meet this public interest test, it should be equally clear that a choice just in Grand Rapids does not. As CPI states, "95% of the customers served by competitors in Michigan are served by one company in one city. The remaining .. consumers served by Ameritech in Michigan would appear to have no realistic choice for local telephone service." CPI at 13.

fully open to competition. With a return on equity of 43.3% for the first nine months of 1996 (AG at 7), it is clear that allowing Ameritech to expand into interLATA while maintaining its local dominance will only add to these supracompetitive profits.¹⁰ Only when Ameritech faces real competition in the local and intraLATA markets will these profits return to more reasonable levels.

IV. CONCLUSION

For all of the above reasons among others,¹¹ Ameritech Michigan's Application must be denied.

Respectfully submitted,

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¹⁰ Ameritech Ohio's 1996 annual report to the Public Utilities Commission of Ohio reveals a return on equity of 33.6%.

¹¹ For example, Brooks Fiber asserts that Ameritech Michigan's interconnection agreements cannot be said to be the "binding" agreements required by the Act because the agreements contain only interim, not final rates.